

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1132

To be argued by
NEAL J. HURWITZ

In The
United States Court of Appeals
For The Second Circuit

BP/S

UNITED STATES OF AMERICA,

Appellee,

vs.

ARTHUR BERARDELLI,

Appellant.

*On Appeal from the United States District Court for the Eastern
District of New York.*

BRIEF FOR APPELLANT

SEGAL & HUNDLEY

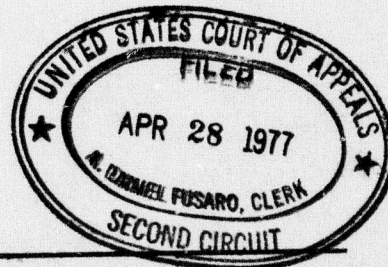
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1132

UNITED STATES OF AMERICA,
Appellee

v.

ARTHUR BERARDELLI,
Appellant.

BRIEF FOR APPELLANT

Preliminary Statement

Arthur Berardelli appeals from a judgment of conviction entered on March 4, 1977 after a two-day jury trial before the Honorable John R. Bartels and a jury. Judge Bartels imposed a five-year term of imprisonment.

Defendant was convicted of criminal contempt, 18 U.S.C. §401(3), for refusing to testify, after being ordered to do so by Judge Bartels, during the trial of United States v. Castellano, et al., Indictment 75 Cr. 521. Notice of the

criminal contempt hearing was given to defendant on application of the United States Attorney by an order to show cause, Rule 42(b), F. R. Crim. P.

Statement of Facts

On November 8, 1976, the trial of United States v. Castellano, et al., 75 Cr. 521, a case involving loansharking activities, commenced before Judge Bartels. On November 10 Berardelli was called as a witness for the prosecution. Berardelli had earlier provided information leading to the indictment and had testified, at length, three times during 1973, 1974 and 1975 before the grand jury.* Berardelli was not given immunity in any of his grand jury appearances. On his first occasion in the grand jury on November 28, 1973 Berardelli was advised by the prosecutor of his rights against self-incrimination and that any testimony he gave could later be used against him. On his two subsequent appearances in the grand jury, he was not advised of any of his rights. The prosecutor advised Judge Bartels at the Castellano trial that the government had an informal, oral understanding with Berardelli, never referred to in any grand jury appearance, that if he fully cooperated with the government he would not be prosecuted for his involvement in

* Defendant testified on November 28, 1973 before a grand jury in the Southern District of New York; on October 16, 1974 before a state grand jury; and on July 24, 1975 before a Southern District of New York grand jury.

Castellano's loansharking activities; but if he decided not to cooperate, he would be prosecuted for his involvement.* (Tr. 355). Clearly, Berardelli was not given use immunity for his testimony in the grand jury, particularly in light of the provision that if the government believed, in its total discretion, that Berardelli was not cooperative, substantive charges could be brought against him in connection with his grand jury testimony.

Berardelli refused to answer questions posed to him by the prosecutor on the grounds that his testimony might be used to incriminate him. (Tr. 379-80). The Court then ordered Berardelli to answer. The order was made under 18 U.S.C. §6003(a), with the intended effect, under §6002 that no testimony or other information given in obedience of the order "may be used against you in a criminal case except a prosecution for perjury, giving a false statement or otherwise for failing to comply with this order." (Tr. 380-84). Defendant continued to decline to testify and was committed, to take effect immediately, "to the custody of the Attorney General ... for the life of the trial of this case, or for six (6) months, or until such time as he purges himself of this contempt, whichever event occurs first." (Tr. 384-87; Appendix

* The government gave defense counsel and the Court a written memorandum of the understanding between Berardelli and the government. (G.Exh. 3516). This undated memorandum was prepared well after his grand jury appearances since it refers to subsequent events. (Appendix p.

Later in the trial, on November 15, Berardelli was again produced to testify, and was advised by the Court that in addition to punishment for civil contempt he could be punished for criminal contempt if he persisted in his refusal. (Tr. 752). However, defendant, after being ordered to testify, refused to answer the prosecutor's questions. (Tr. 752-59). Berardelli was then remanded under the civil contempt order pending the conclusion of the Castellano trial. The case against the Castellano defendants was dismissed at the end of the government's proof.

Defendant and his counsel* contended that the immunity given under §6002 was not coextensive with his fifth amendment privilege against self-incrimination. Counsel, in defendant's presence at the time of the refusals to answer, advised Judge Bartels that Berardelli would testify at the Castellano trial in a manner inconsistent with his prior lengthy testimony before the grand juries and would "recant" some of the statements made therein. (Tr. 756-57). It was urged that if he testified at trial defendant was fearful of being prosecuted for prior perjury in the grand jury; that the prosecution could use his prior sworn testimony before the grand jury, see United States v. Tramunti, 500 F. 2d 1334 (2d Cir. 1974), cert. denied, 419 U.S. 1079 (1974), in a later prosecution for perjury committed during his trial testimony. Judge Bartels never specifically or clearly advised

* Berardelli's counsel in the district court proceedings was an attorney who was apparently appearing in federal court for the first time.

defendant that the immunity given to him at trial protected him from (1) prosecution on the substantive loansharking charges (2) possible perjury committed in the grand jury; or (3) use of the grand jury testimony in a perjury prosecution resulting from his trial testimony.* The Court did

* The following colloquy took place at the time of Berardelli's second refusal to testify:

MR. SGARLATO: There is testimony which Mr. Berardelli will refute and under those circumstances the United States Attorney would prosecute him for perjury.

THE COURT: You mean that he will recant some of the statements he made in the Grand Jury?

MR. SGARLATO: Yes, your Honor.

THE COURT: And under the circumstances --

MR. SGARLATO: (Continuing) The United States Attorney would prosecute him for perjury.

THE COURT: There is nothing wrong with that, is there?

MR. LAUFER: Your Honor, I believe --

MR. SGARLATO: Mr. Berardelli would have to put himself in such a position where he would be testifying and he could be cited for perjury.

THE COURT: He has to tell the truth.

MR. SGARLATO: Where he is going to be prosecuted for perjury?

THE COURT: That is when they recant. Now you can't do that, you can't make a statement under oath and then --

MR. SGARLATO: Then there would be no immunity involved . . . (Tr. 756-757).

It is submitted that the above colloquy, in front of defendant, is indicative of the lack of clarity and direction relating to the scope, and extent of, the immunity in fact granted.

advise defendant that the government would not prosecute him for any compelled statements made "in this case" only. (Tr. 754). It was felt therefore that defendant was not fully protected under the fifth amendment, and counsel so advised Berardelli. (Berardelli trial Transcript, "BTr.", p. 25). He accordingly persisted in his invocation of the privilege since he may well have believed his testimony at trial could possibly have a tendency to incriminate him. (Tr. 757-58). The prosecutor advised the Court before his first refusal to testify that Berardelli's testimony in the grand jury could be used against him in a prosecution for perjury. (Tr. 354). Indeed, the prosecutor told the Court and Berardelli and his counsel after his first refusal to testify at trial that, "the Government was contemplating at this time an indictment for perjury [obviously involving his grand jury testimony since no trial testimony had yet been given] and an indictment for obstruction of justice, and the possibility of an indictment for the charges to which these defendants [Castellano, et al.] are before the Court today." (Tr. 390). Berardelli's fears were clearly not illusory.

On November 17, 1976 Judge Bartels signed an order to show cause why Berardelli should not be held in criminal contempt, pursuant to Rule 42(b), F. R. Crim. P., directing that a hearing be held on November 29. Such order was thereupon served the following day on defense counsel.

(Tr. 781-86). Judge Bartels had told defense counsel that the criminal contempt hearing "will not be a jury case", which the prosecutor confirmed. (Tr. 755).

On the first day of the hearing, November 29, defense counsel for the first time was told by the Court that the contempt would be tried in front of a jury. (BTr. 48). Counsel requested a continuance since he was not prepared to try the case before a jury, particularly since a jury trial would permit the Court to sentence defendant to more than six-months imprisonment. This motion was denied. (BTr. 51-52). Defense counsel then moved to disqualify Judge Bartels from sitting on the contempt trial because of his prior finding of civil contempt against Berardelli. This motion too was denied. (BTr. 54).

The prosecution's proof consisted of the record of proceedings in the Castellano trial relating to Berardelli's refusals to testify, after being ordered to do so. (BTr. 102-07, 108-117, 124-31). Berardelli testified at the hearing in his own defense. He said that he did not understand the Court's immunity order relating to perjury; that his trial testimony would have differed in certain respects from his prior grand jury testimony; that certain things said by him in the grand jury were not correct and true. (BTr. 139-40). Berardelli further testified that certain of the statements of the Court and prosecutor led him to believe that he was not fully protected under the fifth

amendment. (BTr. 143). Judge Bartels then instructed the jury that it was not what defendant believed, but what a "reasonable man would understand", and then further advised the jury that fear and acting on advice of counsel was no excuse to Berardelli's refusal to obey the Court's orders. (BTr. 143). The Court repeatedly during Berardelli's examination commented on defendant's answers and put his own cross-examination type questions to defendant. (BTr. 147, 148, 165-66, 167, 168)*

* THE COURT: He does not answer the question. The question is this, Mr. Berardelli. When the order was read to you as to immunity where all the statements you might make at the trial except perjury, did you understand that to mean that you were immunized from any prosecution by reason of those statements except if at that trial you perjured yourself? Not with respect to anything that came before the trial, but at or after the trial. Didn't you understand that?

THE DEFENDANT: Except the trial, based on testimony from the grand jury that I had given --

THE COURT: No, I don't know what it is going to be based on. That is the point --

THE DEFENDANT: That was, that is what I was in fear of.

THE COURT: Didn't you hear me read the things to you several times? (BTr. 165-66)

* * *

THE COURT: Just answer the question. Did you or did you not know that if you told the truth at the trial, that there would be no possibility of or availability or power on the part of the prosecutor to prosecute you for anything.? (BTr. 167)

Indeed, at one point, after Berardelli said that he did not understand the totality of the immunity granted, the Court said, "Now I believe a reasonable man under the circumstances would understand." (BTr. 168).

In rebuttal summation, the prosecutor told the jury that, as a matter of law, Berardelli could not have been prosecuted "based on anything he said once he had been given immunity on that stand." The prosecutor then went on to instruct the jury as follows:

... Let's pose an example just to make it clear because I really fear there would be some slight doubt in your mind about this and I don't want any doubt to be there whatsoever. Let's suppose that in the Grand Jury Mr. Beradelli sais [sic], "A" and that when he testified at trial he testified and he said, "B", that contradicted "A". Since that testimony, "B" was immunified [sic] it could not have been used against him to prove perjury in the Grand Jury. We would have been precluded from using it. We couldn't have used it. He couldn't have been prosecuted. The judge told him this, time and time and time again. (BTr. 240).

These instructions to the jury on the law, we submit, were in error in light of this Court's decision in United States v. Tramunti, supra. (see Point I, infra) The Court during the proceedings appeared to subscribe to the prosecutor's view also. In short, Berardelli did not get the protection which the prosecutor stated to the jury that defendant, in

fact, got, and Berardelli certainly was never clearly told at the Castellano trial that he had such a broad immunization.

ARGUMENT

POINT I

THE USE IMMUNITY GRANTED TO DEFENDANT UNDER THE FACTS OF THIS CASE DID NOT FULLY PROTECT HIS RIGHTS UNDER THE FIFTH AMENDMENT. DEFENDANT WAS THEREFORE JUSTIFIED IN HIS REFUSAL TO ANSWER

The immunity granted to defendant at the Castellano trial was pursuant to §6002. Under the specific facts of this case, the compulsion to testify herein was a totally inadequate substitute for the assertion of defendant's right not to incriminate himself under the fifth amendment, in light of the gloss placed on §6002 by this Court's decision in United States v. Tramunti, supra. It is submitted therefore that Berardelli was justified in his refusal not to testify because he was not fully protected and that Judge Bartels was wrong in holding defendant in contempt of court. Thus the judgment of criminal contempt must be vacated. Kastigar v. United States, 406 U.S. 441, 449 (1972).

It has long been the law that in order for a claim of privilege to be overcome, defendant must be given protection

commensurate with the privilege. Kastigar v. United States, supra; United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976). The only rational interpretation of this proposition is that a defendant should be in no worse, or better, position for having his claim of privilege overridden by being compelled to testify.

Tramunti, however, permitted compelled, immunized testimony to be used even though a literal reading of §6002 and Kastigar "appeared to make it non-usable." United States v. Housand (2d Cir. Docket No. 76-1156, decided February 25, 1977). In Tramunti defendant was convicted of giving false testimony in a stock fraud trial in which he testified in his own defense. While defendant was on the stand in the false statement trial, the prosecution used against him prior testimony given by Tramunti in a grand jury under a grant of immunity. This Court upheld this use of the prior compelled testimony after a finding by the Court that the grand jury testimony was not true. Thus, the Tramunti decision permits the use of a witness' immunized testimony in a totally unrelated prosecution for perjury against him, even though §6002, literally applied, only permits such testimony to be "used in prosecutions for giving false statements in response to the command to testify." United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973) (emphasis added).

We now turn to the situation confronting Berardelli at the Castellano trial in the light of the ramifications of Tramunti. As stated previously in the Statement of Facts, the Court was advised that Berardelli would testify at trial in a version which would in some respects be inconsistent with his prior lengthy, uncompelled testimony given in three grand jury appearances. It was made unmistakably clear that it was that prior testimony which caused defendant and his counsel to justifiably believe that the immunity given was not sufficient. Further, it was stated that defendant was not seeking immunity from perjury committed in his trial testimony; the law is clear in this regard. See, e.g., United States v. Housand, supra; Glickstein v. United States, 222 U.S. 139 (1911). The immunity granted to Berardelli, as extended by Tramunti, would have permitted the government to prosecute defendant for perjury in the grand jury, and to use the grand jury statements, if false, in a later prosecution for false statements committed during his trial testimony. Additionally, the government may well have been able to use defendant's nonimmunized grand jury statements in a prosecution against him for the substantive charges of loansharking, since the government would have taken the position that Berardelli failed to continue in his cooperation due to his contradictory trial testimony.*

* It appears, however, that Tramunti would not have allowed the compelled trial testimony, even if false, to be used against Berardelli in a prosecution against him for the substantive crime of loansharking. United States v. Tramunti, supra, at 1344, note 5.

Thus, in light of the above, Berardelli and his counsel had a reasonable cause for apprehension that had he testified it would have placed him in a worse position. Hoffman v. United States, 341 U.S. 479, 486 (1951). Neither the Court, nor the prosecutor, instructed Berardelli that he had the full protection he was seeking.* Indeed, the record is so confusing that Berardelli's fears were more than justified. If defendant had been clearly promised by the Court and prosecutor that his prior testimony could, in no way, be used directly or indirectly against him, Berardelli, we must assume, would have testified. And if defendant would have contradicted his grand jury testimony in certain respects, the government would have been able to admit his earlier inconsistent grand jury statements as affirmative evidence at the trial. Rule 801(a)(1), Fed. R. of Evid. In this event, the Cascellano case would have gone to the jury.

It is submitted that the Court should have followed the suggestions of Justice Brandeis in McCarthy v. Arndstein, 266 U.S. 34, 42 (1924):

If Congress should hereafter conclude that a full disclosure ... by the witnesses is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity." (Emphasis added)

* Unfortunately, it may well have been that the Tramunti ramifications raised herein were not considered.

See United States v. Grasso (2d Cir. Docket No. 76-1284, March 9, 1977, at p. 2258); United States v. Spinella, 506 F.2d 426, 432 (5th Cir.), cert. denied, 423 U.S. 917 (1975).

By not conferring complete protection to the witness, and not making clear that he has such protection, the criminal contempt conviction must be reversed.

POINT II

NOTWITHSTANDING THE IMMUNITY GRANTED,
18 U.S.C. §1623(c) WOULD HAVE ALLOWED
THE GOVERNMENT TO PROSECUTE BERARDELLI
FOR "INCONSISTENT DECLARATIONS" MADE
AT TRIAL AND BEFORE THE GRAND JURY

The Court was advised that Berardelli's testimony at trial would be inconsistent with certain of his sworn testimony before the various grand juries. His testimony before the grand juries was not immunized. It is urged that, notwithstanding the immunity granted to defendant at trial, he still could have been prosecuted under §1623(c), if his testimony at trial was materially inconsistent with that before the grand jury. Therefore the Court's order to testify, over the assertion of privilege, was improper.

Section 1623(c) provides that where the defendant made two or more declarations under oath which are inconsistent to the degree that one of them is necessarily false, the government need not allege which declaration was in fact

false and mere proof of the contradiction is enough for conviction.

Since defendant's earlier testimony before the grand jury was not immunized, there would appear to be no prohibition on its use and introduction at a 1623(c) prosecution, particularly in light of this Court's opinion in Tramunti, supra. Moreover, it has been held that §6002 allows the admission of the witness' testimony at a perjury trial to establish that the witness made the perjurious statement. United States v. Hockenberry, 474 F.2d 247 (3rd Cir. 1973). Thus, the government would be able to introduce both the trial testimony and the earlier testimony in the grand jury in a trial against Berardelli under 1623(c). This evidence would be sufficient to establish the crime, since mere proof of the contradiction is enough for conviction.

Research has not uncovered any case on this issue with the same factual pattern as this case. Recently, the Seventh Circuit in United States v. Patrick, 542 F.2d 381 (1976) held that a 1623(c) prosecution would not be permitted where both of the sworn declarations were given under a grant of immunity. In doing so, the Seventh Circuit interpreted §6002 and Kastigar v. United States, supra, literally, without the gloss put on the statute by Tramunti. It would appear, however, that if the prior testimony were not

immunized, as in the instant case, that Court would have decided differently, and held that the grant of immunity given to Patrick at trial was not sufficient protection to him.

We urge therefore that Berardelli's fear of a 1623(c) prosecution gave additional support to his claim of privilege.

POINT III

THE DEFENDANT SHOULD HAVE RECEIVED
ADVANCE NOTICE THAT THE CHARGE
INVOLVED IN THE CONTEMPT HEARING
WAS A "SERIOUS" OFFENSE AND THAT
THE TRIAL WOULD BE BEFORE A JURY

This criminal contempt proceeding was instituted by Order to Show Cause pursuant to Rule 42(b), F. R. Crim. P. There was no indictment by a grand jury. The order to show cause did not specify the "seriousness" of the contempt proceeding, nor did it notify defendant that the contempt hearing would take place before a jury. Thus, defendant and his counsel received no notice, prior to the first day of the trial, on November 29, that defendant's contempt could be punishable by more than six-months' imprisonment. See Cheff v. Schnackenberg, 384 U.S. 379 (1966).

On the morning of the trial's first day, counsel, totally surprised by the fact that there would be a jury trial, requested an adjournment since he was not prepared

to try the case before a jury. His application was denied. (BTr. 48-52). Counsel had earlier been told by the Court and prosecutor, in clear language, that the hearing would not involve a jury trial. (Tr. 755). In this event, the punishment for criminal contempt is limited to a maximum of six months.

We submit that the defendant was denied proper and timely notice of the extent of his jeopardy, the grade of the offense with which he was charged, or the nature of the proceeding against him. The Court, therefore, should have granted his motion for an adjournment.

United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970) involved a similar proceeding as the instant one. There, the judge granted an adjournment of trial to defendant at the time when the court labeled the contempt as "serious", and not "petty". The Appellate Court found no prejudice to defendant, in light of the adjournment.

In United States v. Gordon, 253 F.2d 177, 180 (7th Cir. 1958), the indictment failed to notify defendant as to whether certain charges against him were felonies or misdemeanors. The Court held that by failing to give such notice, the charges alleged in the indictment were insufficient as a matter of law.

In light of the five-year sentence imposed, we submit that the Court's denial of defendant's request for adjournment of the hearing was prejudicial error, particularly

so here, since defense counsel had clear, unequivocal earlier notice from the Court and the prosecutor that the hearing would be non-jury, which, of necessity, would involve a "petty offense" proceeding.

POINT IV

JUDGE BARTELS SHOULD HAVE GRANTED
DEFENDANT'S MOTION FOR RECUSAL

On the morning of the first day of the contempt hearing before Judge Bartels, defense counsel timely moved for Judge Bartels' disqualification on the ground that he had earlier held Berardelli in civil contempt and that that fact would influence the jury against the defendant. The Court denied this motion. (BTr. 53-54). It is submitted that Judge Bartels should have recused himself, particularly in light of the judge's later aggressive questioning of Berardelli concerning defendant's understanding of the scope of the Court's immunity order.

It is beyond question that the "neutrality of the trial judge is of critical importance to the fairness of a criminal trial." United States v. Bukowski, supra at 1109. Moreover, "his influence upon the jury is great, and he must carefully guard against prejudicial comments which might create even the appearance of partiality." Ibid.

Here, the influence of Judge Bartels on the jury was doubly "great" since he had earlier held defendant in

civil contempt, and the entire record concerning that finding was read to the jury. Additionally, on the critical factual issue to be resolved by the jury concerning Berardelli's personal understanding of the immunity granted, the Court during Berardelli's cross-examination continuously inserted himself in such a way as to give the jury the distinct impression that he disbelieved Berardelli. (See Statement of Facts, page 8, supra). Indeed, when Berardelli testified that he did not understand the full import of the immunity granted, the Court said, "Now I believe a reasonable man under the circumstances would understand." (BTr. 168). This was the only real factual issue to be determined by the jury. It is submitted that this comment, in and of itself, is sufficient to constitute reversible error, since it demonstrated the judge's total disbelief of defendant's testimony. No instructions by the Court could possibly wipe away the prejudice.

In similar cases where request is made for trial before another judge, that request is usually granted. Thus, in United States v. Patrick, supra at 390, the Court stated:

The record reflects that Judge Marshall did afford Patrick an opportunity to request trial before another judge but such opportunity was not accepted.

See also, United States v. Wilson, 488 F.2d 1231, 1233 (2d Cir. 1973), rev'd on other grounds, 421 U.S. 309 (1975) (request for different judge on sentencing).

We submit that Judge Bartels should have granted the motion for recusal. By not doing so, defendant did not receive a fair trial.

POINT V

DEFENDANT'S FIVE-YEAR SENTENCE SHOULD BE REDUCED

It is submitted that Berardelli's five-year prison sentence was excessive. It has been stated that punishment of criminal contempt should reflect the "least possible power adequate to the end proposed." Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231. Appellate courts have "special responsibility" over sentencing in criminal contempt cases, and have the clear power to revise sentences. See Cheff v. Schnackenberg, supra, at 380; United States v. Leyva, 513 F.2d 774 (5th Cir. 1975).

It is submitted that this Court should take into consideration the following factors in reduction: (1) the fact that defendant's refusal to testify was not done with any malicious intent; (2) that he was, in good part, acting on advice of counsel in his refusal; (3) that defendant may very well have been motivated in part by fear for personal

safety and that of his family; (4) that defendant's wife, who was related to certain defendants on trial, would have separated from him and had refused to relocate geographically with him had he testified; and (5) defendant had provided substantial cooperation to the government, and indeed, had testified as a prosecution witness in a criminal proceeding subsequent to this contempt. These factors would appear to make the sentence excessive.

In numerous other criminal contempt cases appellate courts have reduced sentence. See, e.g., United States v. Leyva, supra (35 years reduced to 2 years); United States v. Bukowski, supra (3 years reduced to 18 months). Moreover, in United States v. Huss, 520 F.2d 598, 600 (2d Cir. 1975), the defendant Huss was given a sentence of one year by the district court judge after a criminal contempt jury trial, despite his refusal to testify at a criminal trial, labeled by Chief Judge Kaufman as one of the "seamiest", involving "the loss of human life." United States v. Huss, 482 F.2d 38, 41 (2d Cir. 1973).

Surely, Berardelli's conduct does not call for five times the prison sentence imposed in Huss.

POINT VITHE COURT INCORRECTLY CHARGED THE JURY

A. The law is clear that to support a conviction for criminal contempt the government must prove beyond a reasonable doubt, inter alia, that the defendant acted "wilfully and knowingly" in defiance of a court order. Panico v. United States, 375 U.S. 29 (1963); United States v. United Mine Workers, 330 U.S. 258 (1947). The Court instructed the jury, in essence, that if the defendant understood the Court's words when he received immunity at the Castellano trial and understood the extent of his immunity and still consciously refused to obey the Court's orders, then his conduct was "wilfull" and knowing". (Tr. 253) We submit that the Court improperly failed to instruct the jury that the defendant must have understood that his actions were against the law (as opposed to against the court's order) in order for the jury to convict him of criminal contempt.

In United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), the Court of Appeals for the Seventh Circuit approved the following instruction in a criminal contempt case where the facts were similar to those in the case at bar:

An act or failure to act is
'willfully' done if done
voluntarily and intentionally,

and with the specific intent
to fail to do something the
law requires to be done; that
is to say, with the purpose
either to disobey or disregard
the law." 542 F.2d at 389.
(Emphasis added)

Thus, according to Patrick, the jury in a criminal contempt case must find not only that the defendant intended to disobey the court's order but also that he had the specific intent to disobey the law.

This construction of the term "wilfully" was also specifically approved by the Third Circuit in United States v. Malinowski, 472 F.2d 850 (1973) and United States v. Palermo, 259 F.2d 872 (1958). In Malinowski, where the defendant was convicted under 26 U.S.C. §7205, the Court of Appeals approved an instruction that the defendant acted "wilfully" only if he acted "with knowledge that he was breaching the statute." 472 F.2d at 855. Thus, the jury had to find "not only that [the defendant] intended to perform the conduct, but also that he had the specific intent to do something he knew the law forbade." Id. (emphasis added). Accord, United States v. Moylan, 417 F.2d 1002, 1004 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970). United States v. Simpson, 460 F.2d 515 (9th Cir. 1972).

We submit that if defendant did not understand the law as he claimed (as opposed to the Court's order), he could not possibly have had the specific intent to disobey

the law, in other words, he could not have had "knowledge that he was breaching the statute." United States v. Malinowski, supra at 855. Defendant requested and was entitled to a jury instruction to this effect, but the Court did not so charge the jury.

B. The Court charged the jury that it must find that the Court gave defendant immunity for any statements he may make at trial. (BTr. 252). In instructing the jury in this regard, the judge stated, "You will recall that the defendant understood he had received immunity...." (BTr. 253). Berardelli's testimony was clearly to the contrary, since he testified that he did not understand he was fully immunized.

The Court went on to say to the jury:

"I instruct you that the privilege against self incrimination is not a valid reason for refusing to testify in this Court after this Court granted this defendant immunity. Privilege against self incrimination is not a defense in a criminal contempt case...." (BTr. 254).

It is submitted that the above instruction is clearly erroneous, since a proper assertion of the fifth amendment was, under the facts of this case, directly related to the grant of immunity. If defendant believed he did not get sufficient immunity, he was entitled to assert the fifth amendment. Counsel submitted a request

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encompassing this, and made proper objection at the end of the Court's charge. (BTr. 262).

CONCLUSION

The judgment of conviction of defendant Berardelli should be reversed.

Dated: April 25, 1977

Respectfully submitted,

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NEAL J. HURWITZ
LAWRENCE S. BADER

Of Counsel

CERTIFICATE OF SERVICE

77-1132
Re: U.S.A. v. Berardelli

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellant.

That on the 25th day of April , 1977, I served the within

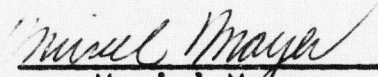
Brief and Appendix

In the matter of U.S.A. v. Arthur Berardelli

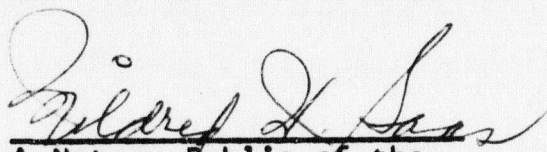
upon Assistant United States Attorney
David Trager, Esq.
United States Courthouse
225 Cadman Plaza
Brooklyn, New York 11201

Brief & 1 Copy Appendix, of the
by depositing two (2) true copies of the/same securely enclosed

in a post-paid wrapper, in an official depository maintained by the
United States Government.


Muriel Mayer

Sworn to and subscribed
before me this 25th day
of April 1977.


A Notary Public of the
State of New Jersey.

WILDRED W. SAAS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires February 2, 1978

